No. 86-228

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In the Supreme Court of the United States

OCTOBER TERM, 1987

JUOZAS KUNGYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES ON REARGUMENT

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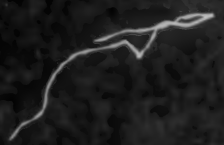

TABLE OF AUTHORITIES

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1. Petitioner maintains (Pet. Supp. Br. 8-15) that he is not subject to denaturalization for want of good moral character. He offers a variety of statutory and constitutional arguments, all of which lack merit.

a. Petitioner's principal assertion (Pet. Supp. Br. 9) is that under 8 U.S.C. 1101(f)(6), false testimony must be material in order to warrant denaturalization. He attempts to derive a materiality requirement from the provision in Section 1101(f)(6) requiring that false testimony must have been given "for the purpose of obtaining any benefits under [the immigration laws]." According to petitioner (Pet. Supp. Br. 9), that provision "is at least the functional equivalent of requiring that the false testimony concern a fact material to obtaining an immigration benefit."

While we agree with petitioner (Gov't Supp. Br. 12) that the "purpose of obtaining [immigration] benefits" language in Section 1101(f)(6) constitutes an important element that the government must satisfy to establish lack of good moral character, we disagree with his claim that

that language imposes a requirement of materiality. Section 1101(f)(6) is concerned with moral character. The relevant inquiry under that provision is therefore whether the visa or citizenship applicant had the wrongful intent to deceive the government in order to obtain immigration benefits. In contrast, the misrepresentation clause of Section 1451(a) is concerned with information gathering, and the focus of that provision is therefore on the importance of the false statement to the decisionmaker. It is for that reason that Section 1451(a) requires that a false statement be material, while Section 1101(f)(6) requires that the statement be given with the intent to deceive.

While there may be substantial overlap in many instances, the difference between the two provisions can be important. For example, a person may have willfully given false material testimony but may not have done so with an intent to obtain immigration benefits. That testimony would satisfy the misrepresentation clause of Section 1451(a), but it would not satisfy Section 1101(f)(6). Conversely, a person may have erroneously believed that a certain fact was relevant and may have deliberately given false testimony about it in order to obtain immigration benefits. Section 1101(f)(6) *would* apply in such a case, regardless of whether the fact was material.

Besides the differing purposes served by Sections 1101(f)(6) and 1451(a), the difference in language clearly signals an intent on the part of Congress to impose different proof requirements under each provision. If Congress had intended to impose a materiality requirement in enacting Section 1101(f)(6), it presumably would have used the word "material," as it did in Section 1451(a), as well as in other places in the statute (*e.g.*, 8 U.S.C. 1182(a)(19)), instead of using the much longer phrase "for the purpose of obtaining any benefits under this chapter." See generally *Russello* v. *United States*, 464 U.S. 16, 23

(1983) (refusing to attach the same meaning to two different phrases in a statute).[1]

b. Petitioner also argues (Pet. Supp. Br. 10) that denaturalization under Section 1101(f)(6) based on false testimony would be unconstitutional, because "native born citizens would be subject only to fine and imprisonment" for similar conduct. That claim, which petitioner raises for the first time in his supplemental brief, is totally without merit. There is nothing unconstitutional about denaturalizing a person for misrepresentation or illegal procurement, since the government is simply taking away something that, in light of the person's pre-citizenship conduct, was never rightfully his. See *Luria* v. *United States*, 231 U.S. 9, 24 (1913). As one court recently noted, "the differences in treatment [between naturalized and native citizens] is due to the inherent differences in the two types of citizenship; for natives there are no pre-citizenship acts to prescribe." *United States* v. *Kairys*, 782 F.2d 1374, 1383 (7th Cir.), cert. denied, 476 U.S. 1153 (1986).

If petitioner were correct, then *all* denaturalizations under Section 1451(a) would be unconstitutional. Yet this Court has never suggested that there is anything unconstitutional about subjecting only naturalized citizens

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[1] The Baltic-Ukrainian-American Compact, et al. [hereinafter amici] appear to recognize the difference between materiality and a "purpose of obtaining [immigration] benefits," but they argue that *both* elements of proof should be required in a denaturalization action based on Section 1101(f)(6) (Amici Br. 34-35). As we have explained, however (Gov't Supp. Br. 5-15), the text and history of Section 1101(f)(6) simply do not support reading a materiality requirement into the statute.

In addition, both petitioner (Pet. Supp. Br. 14) and amici (Amici Br. 35) contend that the government failed to prove that petitioner's lies were for the purpose of obtaining immigration benefits. However, both briefs ignore the district court's specific finding against petitioner on that point (see Pet. App. 120a).

to loss of citizenship under Section 1451(a).[2] Indeed, the Court's cases make clear that the opposite is true. For example, in *Costello* v. *United States*, 365 U.S. 265 (1961), the Court upheld the denaturalization of a person who concealed his occupation as a bootlegger. Obviously, a native-born citizen would not lose his citizenship for having engaged in such activity. Similarly, if petitioner were correct, this Court should not have upheld the denaturalization of Feodor Fedorenko (see *Fedorenko* v. *United States*, 449 U.S. 490 (1981)). And the entire underlying premise of *Chaunt* v. *United States*, 364 U.S. 350 (1960)—that the government can denaturalize someone if the requirements of Section 1451(a) are met—would be erroneous. In short, there is no constitutional impediment to denaturalizing a person who obtained his citizenship without possessing the requisite good moral character.[3]

c. Petitioner also contends (Pet. Supp. Br. 10) that he cannot be denaturalized for want of good moral character because "[t]here was no warning or any notice that subse-

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[2] Petitioner cites *Klapprott* v. *United States*, 335 U.S. 601, 619 (1949), to support his contention (Pet. Supp. Br. 10). But the page cited by petitioner is from Justice Rutledge's concurring opinion. Justice Rutledge explicitly recognized that his view—that a naturalized citizen should not be able to lose his citizenship for reasons that do not apply to native-born citizens—"ha[s] not prevailed here" (335 U.S. at 617; see also *id.* at 619).

[3] There is likewise no merit to petitioner's claim (Pet. Supp. Br. 10) that lack of good moral character is not a statutory basis for denaturalization. Petitioner fails to note that a person who lacked good moral character at the time of his naturalization is deemed to have procured his citizenship illegally. See Section 1451(a); *Fedorenko*, 449 U.S. at 515 (failure to satisfy a statutory prerequisite to citizenship justifies revocation of that citizenship on the ground of illegal procurement). Congress in 1961 restored illegal procurement as a ground for denaturalization with the specific purpose of enabling the government to denaturalize persons who obtained citizenship without possessing the requisite good moral character, as defined in Section 1101(f) (see Gov't Supp. Br. 11).

quently obtained citizenship could be revoked on the basis of lack of good moral character for making any false statement." His argument, apparently, is that he believed that he could freely lie, with no consequences, about basic biographical facts as long as those facts were not material.

In the first place, the issue of notice is irrelevant; the only issue is whether a person possessed the requisite qualifications for citizenship at the time he was awarded that privilege. It cannot seriously be suggested, for example, that someone who had been convicted of murder prior to obtaining citizenship—and who therefore lacked good moral character (see 8 U.S.C. 1101(f)(8))—cannot be denaturalized unless he knew, at the time he applied for citizenship, that murderers were not entitled to that benefit. Similarly, whether petitioner knew that he could be denaturalized for giving false testimony to immigration authorities is not relevant.

In any event, petitioner was clearly on notice that any lies he told were at his own peril. While petitioner dismisses his lies as "innocuous" and "trivial" (Pet. Supp. Br. 42), those lies related to the very facts that Congress explicitly required a visa applicant to disclose, namely, his date and place of birth. See Immigration Act of 1924, ch. 190, § 7(b), 43 Stat. 156. Indeed, at the time petitioner applied for his visa, misrepresentations concerning identity were viewed by many courts as material per se. See Gov't Br. 30-31 n.28 (citing cases). Moreover, petitioner's application for citizenship warned him about the importance of telling the truth (J.A. 42). And in 1953, when petitioner applied for citizenship, the law was clear (as it is today) that (1) no person was entitled to naturalization if he lacked good moral character (8 U.S.C. 1427(a)), and (2) no one was entitled to claim that he possessed good moral character if he had given false testimony for the purpose of obtaining immigration benefits (Section 1101(f)(6)).[4]

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[4] Although illegal procurement did not exist as a ground for denaturalization between 1952 and 1961 (see Gov't Br. 47 n.48), it

In addition, in the years prior to petitioner's naturalization, a number of courts had held, without even addressing the issue of materiality, that giving false testimony evidenced bad moral character. See, *e.g.*, *Stevens* v. *United States*, 190 F.2d 880, 881 (7th Cir. 1951); *United States* v. *Harrison*, 180 F.2d 981, 983 (9th Cir. 1950); *Del Guercio* v. *Pupko*, 160 F.2d 799, 800 (9th Cir. 1947); see also *United States* v. *Forrest*, 69 F. Supp. 389, 390-391 (D.R.I. 1946) (ordering denaturalization because of false testimony); Gov't Br. 46 (citing cases).[5] Petitioner could

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would have been unreasonable for petitioner to have concluded that if he managed to obtain citizenship without possessing the necessary qualifications, the government would be powerless to act. In 1948, when petitioner declared his intention to become an American citizen, illegal procurement was still a basis for denaturalization (see *ibid.*). Moreover, as we have explained (Gov't Br. 47-48 n.48), Congress intended that the illegal procurement provision be applied retroactively, and retroactive application of that provision does not offend the Constitution. The government is "not mak[ing] any act fraudulent or illegal that was honest or legal when done" (*Luria*, 231 U.S. at 24), since at the time petitioner applied for citizenship, no applicant was eligible if he had given false testimony for the purpose of obtaining immigration benefits (8 U.S.C. 1101(f)(6), 1427(a)).

[5] Petitioner states that at the time he entered this country, a misrepresentation justified refusal of a visa or exclusion only if it related to an ultimate disqualifying fact (Pet. Supp. Br. 14 (citing cases)). But petitioner ignores the cases holding that lies relating to identity were deemed material per se and that false testimony demonstrated lack of good moral character.

Petitioner similarly errs in relying for support on the savings clause in the 1952 immigration statute (Pet. Supp. Br. 11 (quoting 8 U.S.C. 1101 note)). That clause merely states, in relevant part, that a visa or other immigration document that was valid prior to the enactment of the 1952 statute would remain valid after that enactment. Petitioner's naturalization occurred under the *1952* statute – not prior to the enactment of that statute – so the savings clause has no bearing on the false testimony he gave in 1953 in connection with his naturalization proceedings. Moreover, petitioner is in no position to assert the purported validity of his visa. Section 2(f) of the 1924 Act provided that a

not reasonably have believed that he could lie under oath about his date of birth, place of birth, wartime residence, and wartime occupation, yet face no risk of denaturalization.[6]

2. With respect to the material misrepresentation clause of Section 1451(a), petitioner asserts (Pet. Supp. Br. 20) that the government cannot establish the materiality of a false statement unless the government proves an ultimate disqualifying fact. Petitioner appears to concede, as he has previously, that the literal language of the second *Chaunt* test supports the materiality test urged by the government (Pet. Supp. Br. 16-17, 24; see also Pet. 8; Oral Arg. Tr. 4). He contends, however, that "[the] Court is not bound by the *dicta* in *Chaunt*" and that it should "reject or

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visa applicant must comply with the provisions of that Act (43 Stat. 154), and Section 7(b) provided that the applicant must state his date and place of birth (43 Stat. 156). Petitioner plainly did not comply with Section 7. The government's position throughout this case has been that because of his false statements, petitioner's visa was never valid.

[6] Ironically, one of the leading cases holding that a person giving false testimony can be denaturalized for want of good moral character was rendered in the very district where petitioner later obtained his citizenship. Petitioner submitted his petition for naturalization in the district court of New Jersey on October 23, 1953 (Pet. App. 44a; J.A. 48). Three months earlier, on July 10, 1953, that same court had issued a published decision ordering the denaturalization of a person for lying about his criminal background. *United States* v. *Accardo*, 113 F. Supp. 783, 786 (D.N.J.), aff'd on opinion below, 208 F.2d 632 (3d Cir. 1953), cert. denied, 347 U.S. 952 (1954). The court reasoned that by lying, the person had demonstrated a lack of good moral character (113 F. Supp. at 786). In reaching its decision, the court asked (*ibid.*): "How can a person claim to be of 'good moral character' • • • at the very time he is seeking to defraud the United States, in a matter of moment both to him and to the country?" In light of that decision, no applicant for citizenship in the district court of New Jersey in October 1953 could have felt secure in lying to immigration officials.

abandon [that] *dicta*" in favor of a standard that requires proof of a disqualifying fact (Pet. Supp. Br. 16-17 (emphasis in original)). This Court should reject petitioner's invitation.[7]

a. The most notable feature of petitioner's argument is that, as in all of his previous briefs, petitioner totally fails to explain how, if proof of an ultimate disqualifying fact were required, the misrepresentation clause of Section 1451(a) would have any meaning. As we have indicated (Gov't Br. 23-24), if the government proves an ultimate disqualifying fact, it has thereby established illegal procurement, and the misrepresentation provision becomes redundant. Petitioner also fails to respond to the serious problem that, under his proposed standard, an applicant for a visa or citizenship would have no incentive to tell the truth if he believed that any information about his past could adversely affect his application (see *id.* at 22-23).

Furthermore, the reasons given by petitioner in support of his proposed standard do not withstand scrutiny. His principal contention (Pet. Supp. Br. 17) is that unless proof of an ultimate disqualifying fact is required, the government's burden will be inconsistent "with the rigorous burden of proof [in denaturalization cases] by evidence that is clear, unequivocal and convincing (leaving no issue of law or fact in doubt)." That argument confuses the burden of proof with the test for materiality.

In a perjury prosecution, for example, the government must prove its case beyond a reasonable doubt. Yet, as we have noted (Gov't Br. 25-27), the applicable materiality test in perjury cases is simply whether the false statement had a natural tendency to influence, or was capable of influencing, the tribunal or official. No one would seriously

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[7] Petitioner's characterization of the second *Chaunt* test as dictum is incorrect. To find that the failure to disclose the arrests was immaterial, the *Chaunt* Court had to find that the arrests were not material even under the most lenient materiality standard, *i.e.*, the second prong of the test.

suggest that by applying that materiality test in perjury prosecutions, the courts have somehow diluted the burden of proof in criminal cases. That same analysis applies *a fortiori* under Section 1451(a); adoption of the criminal materiality standard, as we have urged (Gov't Supp. Br. 26-30), would not dilute the "clear, unequivocal, and convincing evidence" standard. In short, petitioner's reference to the burden of proof in denaturalization cases is not helpful in resolving the materiality issue.[8]

Petitioner further errs in relying for support on a submission by then-Deputy Attorney General White to the House Judiciary Committee in 1961 (Pet. Supp. Br. 19; see also Pet. Reply Br. App. 1a-3a). That submission merely stated that the Justice Department opposed lowering the burden of proof in denaturalization actions from "clear, unequivocal, and convincing evidence" to a "preponderance of the evidence" (*id.* at 1a-2a). Petitioner erroneously suggests that the government's present position is "in extreme contrast to, and a radical departure from," the one taken in 1961 (Pet. Supp. Br. 19). The government in the present case is in no way suggesting that the "clear, unequivocal, and convincing" standard of proof in denaturalization actions be lowered. By the same token, the Justice Department in 1961 was not even addressing the issue of materiality, let alone urging a standard that requires proof of an ultimate disqualifying fact. Indeed, in October 1961—four months after the submission to the Judiciary Committee—the Attorney General issued a ruling adopting a materiality standard that is entirely consistent with the one proposed by the government here. See *In re S- and B-C-*, 9 I. & N. Dec. 444, 447 (1961).

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[8] Petitioner makes much of the fact that the government at one time charged him with lying about his marital status (Pet. Supp. Br. 20-23). When the government learned the true facts, however, it promptly sought and obtained dismissal of that charge well in advance of trial (C.A. App. 1A (docket entry 102), 172, 176). Those events have no bearing on the issues before the Court.

Nor does petitioner advance his position by relying on this Court's decision in *Anderson* v. *Liberty Lobby, Inc.*, No. 84-1602 (June 25, 1986) (see Pet. Supp. Br. 20, 28). In *Liberty Lobby*, the Court held that the court of appeals applied an erroneous standard in reviewing the district court's grant of summary judgment in a libel suit brought by public figures. To the extent that the case is relevant at all, it undermines petitioner's position. In discussing when an issue of fact is sufficiently material to preclude summary judgment, the Court stated that "[o]nly disputes over facts that *might* affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment" (slip op. 5 (emphasis added) (quoted in Pet. Supp. Br. 28)). The Court then explained (slip op. 5) that "[the] materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard [clear and convincing evidence] into the summary judgment determination." Thus, *Liberty Lobby* supports the view that materiality does *not* require a definitive fact but only one that "might" affect the outcome. Moreover, the case demonstrates that the issue of materiality is distinct from that of the applicable burden of proof.

b. Petitioner also attempts to derive support for his proposed materiality standard by relying on the phrase "procured by" in Section 1451(a) (Pet. Supp Br. 20, 23-24, 26-28, 31). Although he has not previously emphasized that language during this litigation, he now takes the government to task for ignoring Congress's "unambiguous" language and intent (*id.* at 27).

As we explained, however (Gov't Supp. Br. 30-31), the purpose of the "procured by" language is simply to make clear that the material misstatements or concealments must have been made during the process of applying for a visa or citizenship. As we noted (*id.* at 31-32), reading that language as requiring proof of causation would make the

word "material" redundant, since a false statement that *caused* the granting of a visa or citizenship would necessarily be "material" under any definition of that term. Indeed, petitioner's reading of "procured by" would render the entire misrepresentation clause of Section 1451(a) redundant, since the government would be required to show illegal procurement in every case. Congress could not have intended, by using the language "procured by," to nullify the very clause in which that language appears.

Significantly, while petitioner now relies on the "procured by" language, he fails to cite a single case that has attached significance to that phrase. Nor can he explain why, if that language is so clear, the courts interpreting Section 1451(a)—both prior to and subsequent to *Chaunt*—have almost universally held that proof of an ultimate disqualifying fact is not required. Even the Tenth Circuit in *United States* v. *Sheshtawy*, 714 F.2d 1038 (1983), which held that proof of an ultimate disqualifying fact is required, did not rely upon the "procured by" language. In short, petitioner offers nothing to undermine our submission that when a misrepresentation has been established as "material" within the meaning of 8 U.S.C. 1451(a), the government can establish that citizenship was "procured by" that misrepresentation if it shows that the misrepresentation was made during the process leading to the entry of an order of naturalization.

3. In addition to addressing the issues raised by the Court in its order of June 26, 1987, petitioner and amici raise several other points that require only brief response.

First, petitioner reiterates his argument that the court of appeals improperly overturned the district court's finding that the lies at issue were not material (Pet. Supp. Br. 32-36). In the first place, as we explained (Gov't Supp. Br. 21 & n.12, 30), the ultimate issue of materiality is one of law; the court of appeals was thus not bound by the clearly

erroneous standard on that question. Moreover, as we discussed (Gov't Br. 33-34), the court of appeals did not disagree with any factual findings made by the district court. Rather, the court in essence found that the district court erred in not considering whether *discrepancies* between true information and previously submitted false information would have had an impact on the immigration and naturalization proceedings.

Second, both petitioner (Pet. Supp. Br. 38-42) and amici (Amici Br. 8-20) argue at length that the Soviet-source deposition evidence introduced by the government was unreliable. While we disagree with that contention for the reasons we explained in the court of appeals (Gov't C.A. Br. 29-56), that issue is not before this Court. The district court admitted the depositions solely to establish that the atrocities in Kedainiai occurred (Pet. App. 108a). And while the court of appeals questioned the premise that Soviet evidence should be automatically excluded (*id.* at 6a n.2), it did not ultimately reach the government's claim that the district court erred in restricting the admissibility of the evidence (*id.* at 6a).

Third, amici suggest (Amici Br. 20-25) that petitioner's reason for lying may have been to avoid repatriation to the Soviet Union. But that explanation does not square with the facts of this case. To this day petitioner has refused to admit that he lived in Kedainiai at the time the atrocities occurred there. And as to those lies that he now admits, his explanation is that he acted out of fear of the Germans, not because he feared being returned to Lithuania (see Gov't Br. 46-47 n.47).

Finally, amici (Amici Br. 27-28, 30-32) reiterate petitioner's assertion (Pet. 12; Pet. Reply Br. 20) that an order of denaturalization in this case is essentially a death sentence. As we have explained, however (Gov't Br. 2 n.3), a denaturalization order is simply the initial step leading to possible deportation, and the ultimate outcome of any

subsequent deportation proceedings is not at all preordained by the outcome of this denaturalization suit. As amici themselves note (Amici Br. 25-26), the district court did not find petitioner to be a Nazi war criminal. Accordingly, petitioner could be eligible in deportation proceedings to claim various forms of discretionary relief from deportation that are not available to war criminals (see Gov't Br. 2 n.3). And the district court's finding may enable petitioner to find a country other than the Soviet Union that is willing to accept him. In short, amici's assertion (Amici Br. 27-28) that petitioner "faces almost certain death" is unfounded.

For the foregoing reasons and those stated in our initial and supplemental briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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